Decision 04-12-058 December 16, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers.	Investigation 02-06-003 (Filed June 6, 2002)

ORDER MODIFYING AND DENYING REHEARING OF DECISION (D.) 04-09-062

I. INTRODUCTION

Cingular Wireless ("Cingular") seeks rehearing of D.04-09-062 ("the Decision"), in which we determined that Cingular violated Public Utilities Code sections 451, 702 and 2896,[1] as well as D.95-04-028, and ordered Cingular to pay customer reparations and a penalty of $12,140,000. These violations resulted from Cingular's practice of charging customers Early Termination Fees ("ETFs") without permitting a grace period to determine whether Cingular's service met the customer's needs, particularly during a period of time when Cingular conceded it experienced significant network capacity problems, and yet failed to disclose these capacity problems to potential customers. Cingular filed a timely application for rehearing of D.04-09-062 on October 29, 2004. Intervenor Utility Consumers'

[1] Unless otherwise noted, all statutory references are to the Public Utilities Code.

Action Network ("UCAN") filed a response to Cingular's rehearing application on November 12, 2004.[2]

We have reviewed all of the allegations raised in the rehearing application, and determine that cause does not exist for granting the application. However, we will modify D.04-09-062 to clarify that, upon showing appropriate documentation, Cingular need not pay reparations to customers for whom the ETF was waived or who have already received ETF refunds from Cingular or its agents.

II. DISCUSSION

In its rehearing application, Cingular challenges D.04-09-062 on the following grounds: 1) the Commission acted outside of its authority and jurisdiction; 2) the Decision is not supported by substantial evidence; 3) the Decision violates Cingular's due process rights and is unconstitutionally vague; 4) the Commission has selectively prosecuted Cingular for violating prospective standards; 5) the penalty assessed against Cingular cannot be justified under controlling legal standards; 6) the Decision's conclusion that Cingular owes refunds to customers who paid an ETF is legally wrong; and 7) the Commission failed to bring an action under section 2104 to recover penalties. Cingular also requests oral argument on its rehearing application.

A. Commission Authority and Jurisdiction

Cingular asserts that the Decision unlawfully regulates areas that are both expressly and impliedly preempted by federal law. (Rehearing App., pp. 5-15.) According to Cingular, our determination that Cingular's lack of a return policy violates section 451 amounts to rate regulation and is preempted (Rehearing App., pp. 10-13), and our findings on the sufficiency of Cingular's wireless network and the quality of service amount to entry regulation, which Cingular alleges is also

[2] For a detailed discussion of the underlying factual background and procedural history of this investigation, see D.04-09-062, pp. 2-8.

preempted (Rehearing App., pp. 13-15). Cingular also asserts that the Decision's use of section 451 is unprecedented and unlawful, and that the Decision lacks precedent to support its use of section 451 to retroactively declare Cingular's ETF policy unjust and unreasonable and impose fines and reparation obligations. (Rehearing App., pp. 15-23). Finally, Cingular claims that the Decision's application of section 2896(a) is unlawful. (Rehearing App., pp. 23-27.) These allegations of error lack merit.

Cingular first asserts that federal law preempts the actions taken by the Commission in D.04-09-062. (Rehearing App., pp. 5-10.) According to Cingular, "[s]ection 332(c)(3)(A) of the Communications Act [47 U.S.C. § 332 (c)(3)(A)] generally preempts state and local rate and entry regulation of all commercial mobile radio services to ensure that similar services are accorded similar regulatory treatment and to avoid undue regulatory burdens, consistent with the public interest." (Rehearing App., p. 8 (fn. omitted).) However, as noted in D.02-10-061, in which we denied Cingular's motion to dismiss the Order Instituting Investigation ("OII") in this proceeding, "[t]he OII raises the kind of consumer protection matters that federal law permits the states to adjudicate. The OII neither expressly or impliedly seeks to regulate wireless rates or terms of entry." (D.02-10-061, p. 14.)

In D.04-10-013,[3] we recently rejected arguments similar to Cingular's, in which wireless carriers argued that we exceeded our jurisdiction by intruding upon carrier decisions about the imposition of rates and by improperly restricting carriers' flexibility to establish rate structures and to choose when to impose fees on customers. (D.04-10-013, p. 4.) As to these arguments, we stated: "[S]ection 332 is not so broadly construed . . . . States retain jurisdiction to regulate 'other terms and conditions' of wireless service. 47 U.S.C. § 332(c)(3)(A). This phrase

[3] D.04-10-013 modified and subsequently denied rehearing of D.04-05-057. D.04-05-057 adopted General Order 168, Rules Governing Telecommunications Consumer Protection, which are applicable to all Commission-regulated telecommunications utilities.

has been broadly defined to include consumer protection matters and customer billing information." (*Id*.) We further noted that "[s]everal courts have limited section 332's reach to regulations that *directly and explicitly* control rates or prevent market entry." (*Id*. (emphasis in original), citing *Communications Telesystems Intern. v. CPUC* (9th Cir. 1999) 196 F.3d 1011, 1017; *Spielholz v. Superior Court* (2001) 86 Cal. App. 4th 1366.) The Federal Communications Commission ("FCC") has also rejected carrier arguments that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for service, and the FCC rejected carrier claims that regulations that require an increase in operating costs had an impact on the rates charged, and thus were preempted. (See, e.g., D.04-10-013, p. 5; *In the Matter of Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17,021 (Aug. 14, 2000) ¶ 27 ("a carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service"); *In re Pittencrieff Communications, Inc.* 13 F.C.C.R. 1735 (Oct. 2, 1997), ¶¶ 15-18, 20, 22.)

As to entry regulation, Cingular argues that "the Decision strays into areas reserved for the exclusive jurisdiction of the FCC by seeking to regulate Cingular's entry into the California CMRS [Commercial Mobile Radio Services] market." (Rehearing App., p. 13.) However, as we noted in D.04-10-013, this argument misrepresents the scope of federal preemption of state regulation. (D.04-10-013, p. 6.) Cingular cites the United States Court of Appeals for the Seventh Circuit's decision in *Bastien v. AT&T Wireless Services, Inc.* (7th Cir. 2000) 205 F.3d 983, for the proposition that states may not impose civil liability on wireless carriers for alleged network deficiencies because this would force carriers to do more than required by the FCC, thereby regulating carrier entry into the relevant state market. (Rehearing App., p. 14.) However, while referencing *Bastien* repeatedly in its rehearing application, Cingular fails to mention the Seventh Circuit's more recent decision in *Fedor v. Cingular Wireless* (7th Cir.

2004) 355 F.3d 1069, in which the Court determined that Cingular's claims regarding impermissible entry regulation lacked merit. (*Id*. at p. 1074.) The Court in *Fedor* found that Cingular's argument "stretches the allegations of the complaint beyond recognition" and that, at most, Cingular would be required to either adjust its billing system or alter its contract. (*Id*.) The Court stated: "In other words, Cingular would have to conform its billing practices to the representation made in its contract." (*Id*.) The Court held that this does not constitute improper entry regulation.

In the present case, nothing in D.04-09-062 attempts to regulate either Cingular's rates or its entry into the California wireless service market.[4] The Decision does not prohibit Cingular from imposing ETFs; rather, the Decision determined that the "conditions under which Cingular imposed the ETF" resulted in an unjust rule and constituted unreasonable service. (D.04-09-062, p. 51.) We did not order Cingular to expand or improve its network infrastructure, and did not in any way bar Cingular's participation in the California wireless service market. Therefore, Cingular's assertions to the contrary lack merit.

Cingular next asserts that the Commission improperly applied section 451 to its conduct, and that it had no notice that the Commission objected to ETFs or that the Commission considered the lack of a grace period to be an unreasonable practice. (Rehearing App., pp. 15-18.) Again, Cingular misunderstands the nature of our concerns about Cingular's conduct. In D.04-09-062, we made no finding that ETFs are unreasonable per se, or that the failure to offer customers a grace period is unreasonable per se. Rather, we determined that, given the totality of the circumstances, Cingular's practice of charging ETFs without permitting a grace period to determine whether Cingular's service met the customer's needs,

[4] Cingular also suggests that the Decision imposes a "duty of self-disparagement in the marketplace," whereby Cingular is required to pronounce its own network "unreliable" or "poor" in order to comply with the Decision. (D.04-09-062, p. 15.) To the contrary, in accordance with California law, the Decision merely requires Cingular to provide honest, intelligible information to its customers regarding its service and network capabilities.

particularly during a period of time when Cingular conceded it experienced significant network capacity problems, and yet failed to disclose these capacity problems to potential customers, was unreasonable. As the Decision notes, section 451's "reasonable service" requirement by necessity involves a fact-specific analysis, and "[i]t is impossible to list or otherwise identify every utility action or omission that might fall afoul of § 451 and the law does not require the Commission to do so." (D.04-09-062, pp. 74-75.)

Cingular next asserts that the Decision lacks precedent to support its use of section 451 to retroactively declare Cingular's ETF policy unjust and unreasonable and impose fines and reparation obligations. (Rehearing App., pp. 18-21.) However, as the Decision notes, the Commission has interpreted and applied section 451's reasonable service mandate in a variety of factual situations spanning several decades. (D.04-09-062, p. 49.) For example, utilizing section 451, we have required "that utilities provide accurate consumer information by a readily accessible means, refrain from misleading or potentially misleading marketing practices, and ensure their representatives assist customers by providing meaningful information about products and services." (See D.04-09-062, p. 49-50, fn. 31, and Commission decisions cited therein.) As noted above, because of the fact-specific nature of this inquiry, it is impossible to produce an exhaustive list of all conduct prohibited under section 451. However, given the relevant Commission precedent with respect to section 451, Cingular should not be surprised that its practice of imposing ETFs with no grace period, particularly during a time of significant network capacity problems, and without informing potential customers of these network capacity problems, could run afoul of section 451.

Finally, Cingular claims that the Decision's application of section 2896(a) is unlawful because it retroactively imposes a disclosure requirement based on unstated standards for an imperfect technology. (Rehearing App., pp. 23-27.) Cingular asserts that the Decision punishes Cingular "under section 2896 because

all wireless calls do not go through at all places." (*Id*. at p. 24.) This allegation of error lacks merit because the Decision in no way attempts to impose a standard of "perfection" in wireless service upon Cingular. Indeed, the Decision acknowledges that "[w]ireless service cannot be guaranteed, given the physics of radio energy." (D.04-09-062, p. 81, Finding of Fact 16.) However, we also determined that Cingular, like all wireless carriers, "has detailed engineering information that can predict the likelihood of outdoor, in-vehicle and in-building coverage, typically with 95% accuracy." (*Id*.) We reasonably found that Cingular's failure to disclose known information about its network capacity and coverage capabilities violated section 2896's requirement that consumers be provided sufficient information upon which to make informed choices among telecommunications services and providers.

Thus, Cingular's allegations of error regarding Commission jurisdiction, federal preemption, and the application of sections 451 and 2896 lack merit.

B. Substantial Evidence

Cingular next argues that the Decision is not supported by substantial evidence and that the record does not support a finding that Cingular violated section 451. (Rehearing App., pp. 27-37.) According to Cingular, the Decision lacks adequate findings to support a conclusion that Cingular's lack of a grace period was unjust and unreasonable (Rehearing App., pp. 29-31), and the Decision improperly relies on alleged complaints to conclude that a small number of complaints represented the general dissatisfaction of Cingular's customers (Rehearing App., pp. 31-37). Cingular further asserts that the record does not support a finding that Cingular violated section 2896 (Rehearing App., pp. 37-47), and the Decision's conclusion that Cingular experienced significant network problems throughout 2001 is not supported by substantial evidence in light of the whole record (Rehearing App., pp. 37-43). Finally, Cingular claims that the Decision's conclusion that Cingular failed to disclose known network problems is

not supported by substantial evidence. (Rehearing App., pp. 43-47.) These allegations of error lack merit.

In this proceeding, we weighed all of the evidence submitted by all parties, including Cingular, UCAN and the Commission's Consumer Protection and Safety Division ("CPSD"), in reaching our conclusion that Cingular's ETF policy, and in particular the imposition of ETFs with no grace period during a period of time when Cingular conceded it experienced significant network capacity problems, violated Public Utilities Code sections 451, 702 and 2896, as well as D.95-04-028. Over the course of more than two years, the Commission received and considered voluminous evidence and exhibits from all parties, held nine days of evidentiary hearings in April 2003, extended the deadline for resolving this proceeding in order to consider appeals by Cingular, CPSD and UCAN, and held oral argument on these appeals on December 8, 2003. (D.04-09-062, p. 7.) In addition to considering the factual and legal arguments raised by the parties, the Commission also considered amicus curiae briefs filed by various utilities, wireless industry groups and consumer groups. (D.04-09-062, pp. 7-8.)

After considering all of the arguments and evidence submitted by the parties, we determined that Cingular's conduct and corporate operating practice with respect to the imposition of ETFs "objectively resulted in unjust and unreasonable customer service." (D.04-09-062, p. 75.) We found, and Cingular did not dispute, that Cingular and its agents imposed ETFs for early termination of contracts, without allowing a trial or grace period, despite the fact that Cingular acknowledged that using the phone was the most effective means of determining whether Cingular's service would meet a particular customer's needs. (D.04-09-062, pp. 75, 79, Finding of Fact 2.) Cingular also admitted during hearings that the "maps and brochures provided to customers who asked about coverage were actually rate area maps, not coverage maps, and did not accurately depict coverage." (D.04-09-062, p. 75.) Cingular's witnesses further acknowledged that Cingular experienced problems with respect to the sufficiency of its network,

particularly during 2001, and Cingular internal e-mail correspondence demonstrated that Cingular was aware that it had "NO excess capacity" and that "[i]ncreasing sales would simply make an existing problem worse." (D.04-09-062, pp. 14-16.) We found that there was "no evidence that Cingular's sales representatives and agents were instructed to advise customers about known, major network problems," and customers complained that they were misled about local, as well as out-of-state, coverage and that Cingular sales personnel represented that certain "cities, towns, or even specific streets had coverage, when they did not." (D.04-09-062, pp. 22-23 & fn. 17; p. 79, Finding of Fact 4.) Finally, we found that CPSD investigators and customer witnesses provided "firsthand, verified statements and sworn testimony about problems with Cingular's service," and that these witnesses and their testimony were largely credible. (D.04-09-062, p. 80, Finding of Fact 11.)

Based upon all of the evidence received by the Commission over the course of more than two years, including the evidence and testimony described above, we properly determined that Cingular's conduct violated sections 451 and 2896. As to section 451, we concluded that "[f]rom January 1, 2000 to April 30, 2002, Cingular's official no return/no refund/ETF policy constituted an unfair rule resulting in a corporate pattern and practice that failed to provide adequate, just, and reasonable service to customers, in violation of § 451 and D.95-04-028." (D.04-09-062, p. 82, Conclusion of Law 2.) We further found that "[d]uring 2001, Cingular's corporate pattern and practice of failing to disclose known network problems to customers resulted in a failure to provide adequate, just and reasonable service, in violation of § 451, 702, 2896 and D.95-04-028." (D.04-09-062, p. 82, Conclusion of Law 3.) These determinations are supported by substantial evidence in light of the entire record, and, accordingly, Cingular's allegations of error lack merit.

C. Due Process and Vagueness

Cingular asserts that the Decision cannot withstand constitutional scrutiny because the Commission violated Cingular's due process rights by shifting the burden of proof to Cingular and because the Decision's imposition of standards (sections 2896 and 451) are unconstitutionally vague. (Rehearing App., pp. 47-50.) These allegations of error lack merit.

Cingular first alleges that CPSD did not meet its burden of proof as to several key issues, and that the Commission improperly shifted to Cingular "the burden of disproving allegations and unfounded accusations." (Rehearing App., p. 48.) According to Cingular, the Commission erred in finding that "the limited complaint allegations lodged against Cingular" were "broadly symptomatic" of Cingular's practices and network quality. (*Id*.) Cingular further alleges that "the Decision tries to bridge an evidentiary gap by merely observing that the record is silent" as to certain issues, including whether the complaint allegations against Cingular were representative of the satisfaction level of Cingular's customers, how Cingular's network compared to other wireless carriers, and whether Cingular's network problems were "isolated and local." (*Id*.) Cingular claims that these various evidentiary issues amount to a denial of due process.

Cingular cites no case law in support of its allegation that it was denied due process by the Commission.[5] Cingular does cite to Evidence Code section 500 for the basic proposition that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."[6] (Rehearing App., p. 48.) Cingular also relies upon our

[5] As the party seeking rehearing, Cingular has the burden to demonstrate the specific grounds upon which it considers the Decision to be unlawful, and vague assertions as to the record or the law, without citation, may be afforded little weight. (See Pub. Util. Code § 1732; see also Rule 86.1; Cal. Code Regs., Tit. 20, Sec. 86.1.)

[6] Rule 64 of the Commission's Rules of Practice and Procedure states: "Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved." Section 1701 further provides that "[a]ll hearings, investigations, and proceedings shall be governed by this part and by rules of practice and procedure adopted by the commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner

decision in *Re Accutel Communications, Inc.*, D.02-07-034, which Cingular characterizes as standing for the proposition that allegations of widespread slamming cannot be inferred from a few customer complaints or from a carrier's inability to produce customer authorizations for changes in service. (Rehearing App., p. 48.)

The fundamental problem with Cingular's argument is that it consistently downplays both the volume and character of the evidence presented against Cingular during the course of the Commission's investigation. Over the course of more than two years, Cingular was given ample opportunity to present affirmative evidence related to its conduct and practices, and to cross-examine and rebut evidence submitted against it by both CPSD and UCAN. As noted above, the Commission received and considered extensive evidence from all parties, held nine days of evidentiary hearings, extended the deadline for resolving this proceeding in order to consider appeals by Cingular, CPSD and UCAN, and held oral argument on these appeals. (D.04-09-062, p. 7.) Customer complaints presented against Cingular came from numerous sources, including: 1) 49 verified customer complaints against Cingular; 2) over 1,000 informal complaints by letter or e-mail to the Commission's Consumer Affairs Bureau between January 1998 and October 2002; 3) UCAN's database of 22 verified and 52 unverified customer complaints; and 4) twelve customer complaints to the California Attorney General's Office.[7] (See D.04-09-062, pp. 35-44.) We found that these customer complaints were "largely credible," and that in many instances Cingular's own evidence documented customer dissatisfaction with Cingular's network and service.[8] (D.04-09-062, pp. 80-81, Findings of Fact 11, 12.) We concluded that

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of taking testimony shall invalidate any order, decision or rule made, approved, or confirmed by the commission."

[7] The Decision assigns varying degrees of weight to different types of evidence. For example, the Decision notes that informal complaints should not be given the same weight as declarations or affidavits, and that unverified complaints are not afforded the same weight as sworn testimony. (D.04-09-062, pp. 42-44.)

[8] The evaluation of witness credibility is a matter particularly for the trier of fact, and findings as

the record established by a preponderance of the evidence that Cingular's conduct violated sections 451, 702 and 2896, as well as D.95-04-028. (D.04-09-062, p. 82, Conclusions of Law 1-3.) We did not agree with Cingular's characterization of the complaint allegations as "limited." (Rehearing App., p. 48.) It is well-established that the Commission's factual findings will be upheld as long as they are reasonably supported by substantial evidence. (See, e.g., *Strumsky v. San Diego Co. Emp. Retirement Assn.* (1974) 11 Cal.3d 28, 35; *Molina v. Munro* (1956) 145 Cal.App.2d 601, 604; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 187; *People v. Lane* (1956) 144 Cal.App.2d 87, 89.)

Cingular next alleges that the standards articulated in the Decision with respect to compliance with sections 2896 and 451 are unconstitutionally vague because "the standards fail to sufficiently state what conduct is either prohibited or required." (Rehearing App., p. 49.) This assertion lacks merit because the Commission properly interpreted and applied sections 2896 and 451 to Cingular's conduct, and this interpretation and application is not unconstitutionally vague.

Cingular cites several cases in support of its argument that the standards articulated in the Decision are unconstitutionally vague. (See, e.g., *In re Newbern* (1960) 53 Cal.2d 786, 792; *A.B. Small Company v. American Sugar Refining Co.* (1925) 267 U.S. 233; *People v. Lopez* (1998) 66 Cal.App.4th 615, 630; *Valiyee v. Department of Motor Vehicles* (1999) 74 Cal.App.4th 1026, 1032.) These cases stand for the general, and uncontroversial, proposition that statutes must be definite and specific enough to provide an intelligible standard of conduct for activities that are required or proscribed by law. In *Valiyee*, *supra*, the court found that the statute in question "easily" passed constitutional muster. The court noted that "[r]easonable certainty is all that is required," and stated that a statute is not vague if "any reasonable and practical construction can be given to its language."

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to witness credibility will not be disturbed unless the testimony is incredible or inherently improbable. (See, e.g., *Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 220; *Vessey & Co. v. Agricultural Labor Relations Bd.* (1989) 210 Cal.App.3d 629, 642.)

(*Valiyee*, *supra*, 74 Cal.App.4th at 1032 (citations omitted).) And in *Newbern*, *supra*, the court noted that the requirement of a reasonable degree of certainty in legislation is especially critical in the arena of criminal law. (*Newbern*, *supra*, 53 Cal.2d at 792.)

In the present case, the Commission was amply justified in determining that Cingular's conduct violated sections 451 and 2896, and its interpretation of these statutes in D.04-09-062 was not impermissibly vague. It is well-settled that there is a strong presumption of the validity of Commission decisions, and the Commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes. (*Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410.) As to section 451, we noted that this section requires that all public utilities not only charge just and reasonable rates, but also furnish and maintain adequate, efficient, just, and reasonable service necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public. (D.04-09-062, p. 49.) Section 451 also requires the rules pertaining to service to the public to be just and reasonable. (*Id*.) We noted that, in decisions spanning several decades, the Commission has interpreted section 451's reasonable service mandate to require, for example, "that utilities provide accurate consumer information by a readily accessible means, refrain from misleading or potentially misleading marketing practices, and ensure their representatives assist customers by providing meaningful information about products and services." (*Id*. (fn. omitted).) We expressly found that "the record in this proceeding establishes a corporate pattern and practice that resulted in unreasonable customer service in violation of § 451 . . . ." (D.04-09-062, p. 50.)

As to section 2896, we stated that this section "requires all telephone corporations (including wireless carriers and resellers) to provide customers with '[s]ufficient information upon which to make informed choices among telecommunications services and providers.'" (D.04-09-062, p. 54, quoting

section 2896(a).) We found that "the record on disclosure establishes that Cingular provided very little information to potential customers in its advertising or marketing materials, or via its sales agents, that could assist such customers in assessing Cingular's coverage and capacity capabilities." (D.04-09-062, p. 55.) In weighing the evidence against Cingular, including Cingular's inability to meet its own internal network measurement standards at times, we found that "Cingular's coverage disclosures were insufficient to permit customers to make informed choices about whether to contract for its service." (D.04-09-062, p. 56, (fn. omitted).) We concluded that Cingular's conduct failed to meet "an objective interpretation of the duty owed to customers under § 2896(a)." (D.04-09-062, p. 56.)

It should be noted that Cingular does *not* allege that the plain language of sections 451 and 2896 is vague or ambiguous. Rather, according to Cingular, it is our interpretation of these sections that is impermissibly vague. However, given the unambiguous language of sections 451 and 2896, we properly determined that Cingular's conduct and practices resulted in unreasonable customer service and failed to provide sufficient information for customers to make informed choices about Cingular's service and network capabilities. Thus, Cingular's allegations regarding denial of due process and unconstitutional vagueness lack merit.

D. Selective Prosecution for Prospective Standards

Cingular next alleges that the Commission has selectively prosecuted Cingular for violating prospective standards. (Rehearing App., pp. 50-52.) According to Cingular, it is being singled out for punishment by the Commission for conduct that was not significantly different from that of its competitors. This allegation of error lacks merit.

As a constitutional agency of the State of California, the Commission has broad discretion with respect to the exercise of its enforcement authority. (See California Constitution, Article XII; see also Pub. Util. Code § 701.) It is a general rule that state agencies have discretion to establish priorities in the use of

limited agency resources, and that these agencies are better equipped than the courts to engage in the proper ordering of agency enforcement priorities. (See, e.g., *People v. Cimarusti* (1978) 81 Cal.App.3d 314, 323 (executive branch agencies and officials have discretion with respect to enforcement and disposition of charges in civil action involving imposition of civil penalties); *People v. Smith* (1975) 53 Cal.App.3d 655, 658.) Cingular cites no relevant authority for the proposition that we are required to convene an industry-wide proceeding involving all California wireless providers in order to address Cingular's improper practices and conduct, and we are aware of no such authority.

In addition, Cingular's assertion that it was improperly targeted for Commission prosecution among similarly-situated California wireless providers is belied by record testimony demonstrating that Cingular was alone among its California competitors in its formal, written "no refund/no return" policy. (April 4, 2003 Hearing Transcript, 700:20-25.) Indeed, not only was Cingular's practice uncommon within the California wireless market, it was uncommon even as compared to Cingular's other service territories. (See D.04-09-062, p. 38 (noting that Cingular's other regions had more customer-friendly policies, with return periods varying from three days to 30); see also March 14, 2003 Reply Testimony of CPSD witness Maricarmen Caceres at p. 3, and Attachment 3 thereto (noting that Cingular's Western Region had by far the strictest return policy, permitting "no returns or refunds").)

As to the issue of whether D.04-09-062 creates "wholly new standards" and "retroactively" enforces them against Cingular, this allegation similarly lacks merit. (Rehearing App., p. 51.) As a telecommunications carrier licensed to provide wireless service in California, Cingular is charged with notice of what conduct is prohibited under applicable statutes, regulations and Commission decisions. In addition, Cingular received actual notice from the Commission in the form of a September 2001 cease and desist letter, as well as the June 2002 issuance of the OII in this proceeding, that the Commission was receiving

consumer complaints about its ETF policy, and that these complaints put at issue the legality of this practice. (D.04-09-062, p. 76.) Finally, the Commission, in numerous decisions dating back several decades, has made clear that section 451's reasonable service mandate requires utilities to provide accurate and meaningful product information to customers by a readily accessible means, and to refrain from misleading or potentially misleading marketing practices. (See D.04-09-062, pp. 49-50 & fn. 31.) As the Decision notes, Cingular's ETF policy was unjust, and therefore unreasonable, "because customers were unable to determine whether they would be able to use Cingular's wireless service in the ways they desired until they attempted to make or receive calls – and no customer could do this without first signing a contract for service" that included an ETF for cancellation of service before the expiration of the contract period. (D.04-09-062, p. 50.) Such application of section 451 is consistent with existing Commission precedent, as noted above, and we properly concluded that no utility "should expect to be insulated from the obligation to treat its customers fairly." (D.04-09-062, p. 76.)

Thus, Cingular's assertion that the Commission has selectively prosecuted Cingular for violating prospective standards lacks merit.

E. Justification for $12.14 Million Penalty

Cingular claims that the $12.14 million penalty cannot be justified under the controlling legal standards. (Rehearing App., pp. 52-59.) According to Cingular, we improperly applied the criteria articulated in D.98-12-075 in arriving at a penalty of $12.14 million against Cingular. This allegation of error lacks merit.

In D.98-12-075, we outlined several factors to be considered in assessing fines against a public utility. These factors include the following: 1) the severity of the offense; 2) the conduct of the utility, including the utility's conduct in preventing the violation, detecting the violation, and disclosing and rectifying the violation; 3) the financial resources of the utility; 4) the totality of the circumstances in furtherance of the public interest; and 5) the role of precedent.

(See D.98-12-075 (1998) 84 Cal.P.U.C.2d 155, 182-84.) We noted in D.98-12-075 that "[i]t is fundamental to the Commission's exercise of its powers and jurisdiction that the agency take reasonable steps to ensure that the utilities comply with its orders and rules," and that "the Commission has traditionally imposed fines when faced with persuasive evidence of non-compliance." (*Id*. at 168.)

Section 2107 authorizes the Commission to impose a penalty of $500 to $20,000 per offense for violations of state statutes and orders and decisions of the Commission. (D.04-09-062, pp. 61-62.) Section 2108 further provides that "in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense." (D.04-09-062, p. 62.)

In the present case, we properly considered all of the factors listed above in assessing $12.14 million in fines against Cingular. (See D.04-09-062, pp. 61-66.) In terms of the severity of the offense, the Decision notes that the "violations are extremely serious" and represent "an ongoing corporate practice that failed to provide adequate, just and reasonable service to customers . . . ." (D.04-09-062, p. 63.) We further found that "this corporate practice harmed a large number of customers, inconveniencing them all, causing monetary loss for many and obliging some to deal with collection and credit rating agencies." (*Id*.)

In terms of assessing the utility's conduct, including preventing, detecting, disclosing and rectifying the violations, we found that Cingular refused to acknowledge any wrongdoing and continued to insist "that it has done nothing wrong and that its network problems since 2000 constitute normal growing pains." (D.04-09-062, p. 64.) However, we also found that the evidence demonstrated that Cingular's drive to build market share in California "overshadowed its fundamental statutory duty to operate by just and reasonable rules in order to provide adequate, just and reasonable service." (*Id*.) Further, we were not persuaded by Cingular's argument that the fact that it would sometimes waive all or part of its ETF or offer service charge credits to dissatisfied customers adequately redressed the harm its official ETF policy caused. (*Id*.) Thus, we

concluded that Cingular failed to take affirmative steps to prevent, detect, disclose and rectify its numerous and repeated violations.

Regarding Cingular's revenues and financial resources, we found that there was no means to estimate what portion of Cingular's revenues during the relevant time period was attributable to its official ETF policy. (D.04-09-062, p. 64.) We were able to determine that some customers paid all or a portion of an ETF and that some customers "decided it would cost them less to pay monthly service charges until the contract term expired" than to pay the ETF. (*Id.* at pp. 64-65.) The record in this proceeding also reflected that Cingular reported corporate revenues of $14.746 billion for year-end 2002, that Cingular had approximately 22 million customers at that time, and that Cingular's three million California customers constituted 14% of Cingular's customer base, and likely 14% of Cingular's revenues as well. (*Id.* at p. 65.)

Finally, we properly considered the totality of the circumstances and the role of precedent in assessing fines against Cingular. We considered several recent precedents involving fines assessed against major telecommunications utilities, including *In re Qwest Communications*, D.02-10-059 (fine of $20.34 million for slamming and cramming offenses), *In re Pacific Bell*, D.02-10-073 (fine of $27 million for DSL billing and reporting errors), and *UCAN v. Pacific Bell*, D.01-09-058, limited rehearing D.02-02-027 (fine of $15.225 million for misleading marketing tactics calculated at $17,500 per day for each offense). In particular, we found that *UCAN v. Pacific Bell* provided a very useful precedent for establishing an appropriate fine for Cingular in this proceeding. (D.04-09-062, p. 66.) Pacific Bell's conduct in *UCAN v. Pacific Bell* was considered particularly egregious because it concerned the marketing of basic telephone services to captive residential customers, including immigrant and low income customers, and because Pacific Bell had been fined $16.5 million by the Commission in 1986 for similar conduct. (*Id.*) Given that Cingular did not have a history of prior violations, we determined that a lower daily penalty was appropriate in this

proceeding, and ordered Cingular to pay $10,000 per day for the period from January 1, 2000 to April 30, 2002 (849 days) due to Cingular's no return/no refund/ETF policy, and $10,000 per day for the period from January 1, 2001 to December 31, 2001 (365 days) due to Cingular's failure to disclose known network problems to customers. (*Id*; see also D.04-09-062, p. 82, Conclusions of Law 2-5.) Thus, a penalty of $12.14 million was assessed against Cingular based on the totality of the circumstances.[9]

Cingular clearly disagrees with our interpretation and assessment of the evidence presented against it as a justification for the imposition of fines. However, review of Commission decisions is generally limited to a determination of whether the agency's decision is supported under the substantial evidence test. (See *Strumsky, supra*, 11 Cal.3d at 35.) If the Commission's findings are based on inferences reasonably drawn from the record, a Commission decision is considered to be supported by substantial evidence in light of the whole record, and it will not be reversed. (See, e.g., *Lorimore, supra*, 232 Cal.App.2d at 187; *Lane, supra*, 144 Cal.App.2d at 89.)

Given the weight of the evidence presented against Cingular, and considering all of the factors outlined in D.98-12-075 regarding the imposition of fines, we properly exercised our judgment and discretion in assessing $12.14 million in fines against Cingular. Thus, Cingular's argument to the contrary lacks merit.

F. Refunds to Customers Who Paid ETFs

Cingular next asserts that the Decision's conclusion that Cingular owes refunds to customers who paid an ETF is legally wrong. (Rehearing App., pp. 59-63.) According to Cingular, the Decision's refund requirements amount to preempted rate regulation, are grossly excessive and overbroad, and are arbitrary

[9] Both CPSD and Intervenor UCAN argued that the underlying record would support an increase in the $12.14 million fine assessed against Cingular. (D.04-09-062, p. 72.)

and capricious due to a lack of evidentiary support. (Rehearing App., 60-63.) These allegations of error lack merit.

In D.04-09-062, we ordered reparations to be paid to Cingular customers in order "to limit Cingular's unjust enrichment from the partial or full ETF payments it received from contract cancellations prior to May 1, 2002, the effective date of its present policy." (D.04-09-062, p. 67.) We ordered Cingular to "return, with interest, any sums received for early cancellation of contracts entered into between January 1, 2000 and April 30, 2002, to the customers who paid those sums." (D.04-09-062, pp. 67, 84-85, Ordering Paragraphs 2-3.) We further ordered Cingular to reimburse, with interest, any sums paid by customers after May 1, 2002, for contract cancellations during the first fifteen days of the contract period. (*Id*.) Cingular was also ordered to reimburse customers for ETF payments made to Cingular's agents prior to May 1, 2002, and for any improper ETF collections after May 1, 2002. (*Id*.) We ordered Cingular to file a refund plan with the Commission's Telecommunications Division no later than 75 days from the date of mailing of D.04-09-062. (*Id*.)

The Commission's authority to order customer reparations is well-established. (See, e.g., *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 914-15.) As noted in *Wise v. Pacific Gas and Electric Co.* (1999) 77 Cal.App.4th 287, "[p]ursuant to its constitutional authority to award reparation, the PUC may order public utilities to make reparation to aggrieved ratepayers for rates that are unreasonable, excessive or discriminatory." (See *Wise*, *supra*, 77 Cal.App.4th at 299; see also Pub. Util. Code § 734; Cal. Constitution, Article XII, § 4; *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 907.)

The gist of Cingular's argument seems to be that the Commission cannot order refunds of ETFs because such refunds would amount to rate regulation by

the Commission in violation of 47 U.S.C. section 332(c)(3)(A).[10] (Rehearing App., p. 60.) Cingular claims that the Commission has no authority to prohibit Cingular from charging an ETF. (*Id*.) Other than citing to section 332 itself, Cingular identifies no case law or other authority in support of its argument that the reparations ordered by the Commission constitute impermissible rate regulation in violation of section 332. As noted above, Cingular has the burden to demonstrate the specific grounds upon which it considers the Decision to be unlawful, and vague assertions as to the record or the law, without citation, may be afforded little weight. (See Pub. Util. Code § 1732; see also Rule 86.1; Cal. Code Regs., Tit. 20, Sec. 86.1.)

Cingular's argument that the reparations ordered by the Commission violate section 332 misunderstands both the nature of, and the reasons for, the reparations remedy ordered by the Commission. Contrary to Cingular's assertion, the Decision did not prohibit Cingular, or any other California wireless provider, from charging an ETF. Indeed, the Decision expressly states:

> Our investigation does not seek, either directly or indirectly, to regulate Cingular's rates. We make no findings on whether imposition of an ETF is unreasonable per se. Neither do we make any findings about what amount, if any, constitutes a reasonable or unreasonable ETF.

(D.04-09-062, p. 51.) The Decision instead focused on the specific circumstances surrounding Cingular's imposition of ETFs, including the fact that "Cingular knowingly created and pursued advertising, marketing and sales strategies that sought to secure market share by building Cingular's subscriber base and encouraging increases in minutes of use per customer regardless of the

[10] 47 U.S.C. section 332(c)(3)(A) provides that states have no authority to regulate the rates charged by commercial mobile services. However, section 332(c)(3)(A) also states that "this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services," and that providers of commercial mobile services are not exempt "from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates."

ability of Cingular's GSM [Global System for Mobile Communications] to deliver service." (D.04-09-062, p. 52.) We properly determined that the "conditions under which Cingular imposed the ETF" resulted in an unjust rule and constituted unreasonable service. (D.04-09-062, p. 51.) This does not amount to regulation of Cingular's rates.

Cingular also asserts that our reparations order is grossly excessive and overbroad, and suggests that the reparations ordered in the Decision are akin to penalties and punitive damages. (Rehearing App., p. 60.) Cingular further claims that, by ordering both fines and reparations, the Commission is punishing Cingular multiple times for the same action. (*Id*.) This argument lacks merit and fundamentally misses the point of consumer reparations. The only cases cited by Cingular in support of this argument deal solely with punitive damages. (See *Adams v. Murakami* (1991) 54 Cal.3d 105, 110; *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 928.) However, the reparations ordered by the Commission are not in the nature of punitive damages; rather, they are specifically designed to compensate consumers who were charged ETFs under the unreasonable circumstances outlined above. (See D.04-09-062, pp. 66-67, 83, Conclusion of Law 7 (reparations are designed to make customers whole and to avoid unjust enrichment to Cingular).) Cingular cites no authority for the proposition that it should be permitted to retain the profits from its unreasonable ETF policy, and the Commission is aware of no such authority.

Finally, Cingular asserts that the reparations ordered in the Decision are arbitrary and capricious due to a lack of evidentiary support. (Rehearing App., p. 63.) However, in reviewing Commission decisions, courts generally limit their review to a determination of whether the Commission's decision is supported under the substantial evidence test. (See *Strumsky*, *supra*, 11 Cal.3d at 35.) As long as the Commission's findings are reasonably supported and are based on inferences reasonably drawn from the record, Commission decisions will be found to be supported by substantial evidence in light of the whole record and will not be

reversed. (See *Molina, supra,* 145 Cal.App.2d at 604; *Lorimore, supra,* 232 Cal.App.2d at 187; *Lane, supra,* 144 Cal.App.2d at 89.) As discussed above, we received ample evidence demonstrating that the circumstances surrounding Cingular's imposition of ETFs were unreasonable, resulting in customers being "trapped" into "contracts for service regardless of whether Cingular could provide the coverage or capacity these customers sought." (D.04-09-062, p. 51.) Under these circumstances, our reparations order is properly supported by substantial evidence.

Thus, Cingular's allegation that we erred in ordering customer reparations lacks merit. However, we will modify D.04-09-062 to clarify that, upon showing appropriate documentation, Cingular need not pay reparations to customers for whom the ETF was waived or who have already received ETF refunds from Cingular or its agents.

G. Action to Recover Penalties Under Section 2104

Cingular alleges that we cannot directly impose fines upon Cingular for its violations of the Public Utilities Code and previous Commission decisions without filing suit in superior court. (Rehearing App., pp. 63-64.) This allegation lacks merit, as there is ample authority for the proposition that the Commission is authorized to assess fines against Cingular pursuant to section 2107 without proceeding to superior court. Cingular relies on section 2104, which provides, in part: "[A]ctions to recover penalties under this part shall be brought in the name of the people of the state of California in the superior court . . . ." According to Cingular, we can only impose penalties by bringing an action in superior court.

Contrary to Cingular's argument, the Commission has the authority directly to levy fines and penalties pursuant to sections 2107 and 701. Section 2107 provides:

> Any public utility which violates or fails to comply with any provision of the Constitution of this state or this part, or which fails or neglects to comply with any part or provision

> of any order, decision, decree, rule, direction, demand, or requirement of the Commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than twenty thousand dollars ($20,000) for each offense." (Pub. Util. Code § 2107.)

Section 701 further provides:

> The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction. (Pub. Util. Code § 70l.)

The plain language of section 2104 refers to "actions to *recover* penalties." (Pub. Util. Code § 2104 (emphasis added).) Thus, we have interpreted section 2104 to apply to the "recovery" of penalties, rather than to the imposition of penalties. (See, e.g., *Strawberry Property Owners Assoc. v. Conlin Strawberry Water Co.*, D.00-03-023, (2000) 2000 Cal. PUC Lexis 127, *6-*7, and cases cited therein.)

In 1993, the Legislature enacted Senate Bill ("SB") 485, which amended section 2107 to increase the amount of fines that may be imposed on public utilities. (See Stats. 1993, ch. 221, § 12, p. 1462.) The legislative history for SB 485 expressly acknowledges that the Commission "has broad authority *to levy* appropriate fines in the course of its business," and cites section 701 as the basis of this authority. (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1 (emphasis added).) The legislative history notes that this broad authority has been "supplemented by additional specific fine authority" of a specified dollar amount, as set forth in section 2107. (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1.) Further, a bill analysis explicitly states that SB 485 "would increase the fines the Public Utilities Commission *can levy* against public utilities . . . ." (Senate Committee on Energy and Public Utilities, Analysis of Sen.

Bill No. 485 (1993-1994 Reg. Sess.), as heard on April 20, 1993, p. 1 (emphasis added).)

Moreover, that legislative history also supports our interpretation of section 2104 that the Commission is only required to go to court to collect, rather than to impose, a fine; that is, to collect an unpaid fine. As stated in the legislative history, "[t]he [Commission] must go to the Superior Court *to collect any fines which are levied*." (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1 (emphasis added).)

At one time, we interpreted section 2104 as requiring a court action to impose penalties, rather than the Commission possessing the authority independently to assess fines. (See, e.g., *DiMaggio v. Pacific Bell*, D.92-03-031 (1992) 43 Cal.P.U.C.2d 392, 395.)[11] However, "'an administrative agency may change its interpretation of a statute, rejecting an old construction and adopting a new.'" (*Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1326, quoting *Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1269.) Moreover, "'even when an agency adopts a new interpretation of a statute and rejects an old, a court must continue to apply a deferential standard of review.'" (*Hudson v. Board of Administration*, *supra*, at p. 1326, quoting *Henning v. Industrial Welfare Com.*, *supra*, at p. 1270; see also *Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 484.)

As early as 1990, we interpreted section 2104 to apply to the "recovery" of penalties, rather than to the imposition of penalties. Thus, we have the authority to impose penalties for violations of the Public Utilities Code or Commission decisions, but must recover or collect unpaid penalties through a superior court action. (See *Vortel Communications, Inc. v. Advanced Communications Technology, Inc., et al.* (1990) 1990 Cal.P.U.C LEXIS 673 at p. *17; see also *Re*

[11] The Commission's decision in *DiMaggio*, *supra*, was issued prior to the 1993 amendments to section 2107.

Southern California Water Company, D.91-04-022 (1991) 39 Cal.P.U.C.2d 507, 516.)

No California court has ever accepted Cingular's interpretation of the Public Utilities Code with respect to our ability directly to impose fines. In the past five years, there have been at least six Commission decisions imposing penalties that have been appealed, in whole or in part, on the basis of the Commission's authority directly to impose fines. In each of these cases, a petition for writ of review has been summarily denied by the Court of Appeal. (See, e.g., *Futurenet, Inc. v. Public Utilities Commission*, petition denied June 7, 2000, Case No. B137208; *Conlin-Strawberry Water Co., Inc. v. Public Utilities Commission*, petition denied July 26, 2001, Case No. F035333 [Commission's authority to impose penalties was the sole issue presented to the court]; *Southern California Edison Co. v. Public Utilities Commission*, petition denied Feb. 28, 2002, Case No. B156189; *Vista Group International, Inc. v. Public Utilities Commission*, petition denied April 30, 2003, Case No. A100218; *Qwest Communications v. Public Utilities Commission*, petition denied Oct. 2, 2003, Case No. A102483; *USP&C v. Public Utilities Commission*, petition denied Jan. 7, 2004, Case No. A102657; petition for review denied by Cal. Supreme Court on March 30, 2004, Case No. S122022.) Although a summary denial does not have precedential effect, it is considered to be a "decision on the merits" for res judicata purposes. (See *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630-631; *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905.) And, in light of the decision in *Pacific Bell v. Public Utilities Commission* (2000) 79 Cal.App.4th 269, 272, that a court must grant a petition for writ of review if it finds that the Commission erred, given the number of writs denied on petitions raising this issue, it can be presumed that not all of these petitions were procedurally defective. Therefore, the fact that all such petitions have been summarily denied indicates that the reviewing courts found no legal error.

For all of the foregoing reasons, the Commission has the authority to impose fines directly on Cingular for its unlawful conduct.

H. Oral Argument

Cingular also requests oral argument on the issues raised in its application for rehearing. (Rehearing App., pp. 64-67.) Rule 86.3 of the Commission's Rules of Practice and Procedure specifies that oral argument will be considered if the application "demonstrates that oral argument will materially assist the Commission in resolving the application, and . . . raises issues of major significance for the Commission." (Cal. Code of Regs., Tit. 20, § 86.3.) In the present case, there is ample evidence in the record regarding Cingular's conduct and practices. In addition, we already held oral argument in this proceeding on December 8, 2003 regarding the parties' appeals of the Presiding Officer's Decision. (See D.04-09-062, p. 7.) We have a full understanding of the record, and there are no legal issues requiring further briefing, whether orally or in writing. Additionally, there is no finding that we have departed from existing Commission precedent without adequate explanation. Accordingly, Cingular's request for oral argument should be denied.

III. CONCLUSION

D.04-09-062 is modified as described below. Rehearing of D.04-09-062, as modified, is denied because no legal error has been demonstrated.

IT IS THEREFORE ORDERED THAT:

1. D.04-09-062 is modified by inserting the following sentence as item (d) at the end of Ordering Paragraph 3: "(d) Upon showing appropriate documentation, Cingular need not pay reparations to customers for whom the ETF was waived or who have already received ETF refunds from Cingular or its agents."

2. Rehearing of D.04-09-062, as modified, is denied.

3. Cingular is ordered to file a reparations plan as directed by D.04-09-062, Ordering Paragraphs 2-4.

This order is effective today.

Dated December 16, 2004, at San Francisco, California.

CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I dissent

/s/ MICHAEL R. PEEVEY
President

Comr. Kennedy reserves the right to file a dissent.

/s/ SUSAN P. KENNEDY
Commissioner

Dissent of Commissioner Susan P. Kennedy
Item 71 Cingular Wireless Application for Rehearing

December 16, 2004

I dissent.

Cingular's petition for rehearing raised meritorious issues including lack of an adequate record on which to base the fine we imposed, impermissible vagueness in the standards that we found Cingular had violated, and selective enforcement of our rules.

As I said in my dissent in the original case, the decision punished Cingular for providing inadequate service. Although we do not regulate wireless telephone service quality and the decision is couched in terms of failure to disclose problems with service, it is clear that the real issue was not disclosure per se but service quality.
Even if the record showed, which I do not believe it does, that Cingular's service quality was poor, we lack jurisdiction to fine the company based on poor service quality.

What the record does show is a spotty pattern of complaints about service, which is inadequate to support the fine. Cingular's claim that we violated its due process rights by basing a huge fine on a small number of clearly unrepresentative customer accounts has merit, in my opinion.

Furthermore, we punished behavior that was not against any Commission rule at the time. The Commission decided that a vague standard of conduct would be retroactively applied to impose a fine. This comes perilously close to a due process violation as well.

Finally, as I wrote in my dissent, I am bothered by the fact that the record fails to disclose that Cingular's behavior was significantly different from that of any of its competitors. I realize that a claim of selective enforcement is generally not a defense. For example, it is no defense to a charge of speeding to say that "the other guys were going just as fast." However, I am troubled that we chose to single out one company for punishment before adopting rules of general application to the industry as a whole.

/s/ SUSAN P. KENNEDY

December 16, 2004
San Francisco, California